No. 76-21

In the

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

JAMES J. BERTUCCI, a/k/a FRANK JAMES BERTUCCI; JOSEPH A. ARGENTO and PHILLIP F. ABBOTT,
Defendants-Petitioners.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 2, 1976, and upon its issuance to adopt the opinion of the Honorable Luther Swygert and reverse the defendants' convictions.

OPINION BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit is reported in Appendix "A" *infra*. This decision is as yet unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 2, 1976. A joint timely petition for rehearing *en banc* was filed and denied on June 4, 1976. (App. 14a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutional principles enunciated in the Fourth Amendment was violated in the warrantless search of defendants' motor vehicle on a public highway in Illinois?

2. Whether the majority's finding of "probable cause" for the warrantless searches in question on a highway and later at a police station was proper although there were no citations issued for traffic violations, there were no arrests, and no weapons were found in the vehicle?

3. Whether the majority's reliance on the "plain view" doctrine was proper where the police officers who conducted the warrantless search admitted that the discovery of cartons in the rear of the van gave them "no reason to believe an offense had been committed"?

4. Whether the majority's reliance upon the "consent" of the defendant Bertucci was proper where the police admitted he initially refused them permission to search the van?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioners James J. Bertucci, Joseph A. Argento and Phillip F. Abbott were named in a two count indictment returned by the Grand Jury of the United States District Court for the Eastern District of Illinois. The first count charged that on or about November 17, 1974, Bertucci, Argento and Abbott had possession of three cartons of blue jeans with a value in excess of $100.00 which had been embezzled and stolen while moving as a part of an interstate shipment from Hopkinsville, Kentucky to Chicago, Illinois, knowing them to have been embezzled and stolen, in violation of Title 18, United States Code, Section 659. The second count charged that on or about November 17, 1974, Bertucci, Argento and Abbott had in their possession stereo components, having a value in excess of $100.00, which had been stolen while moving as a part of an interstate shipment of freight from Solon, Ohio to Beaver Dam, Kentucky, knowing them to have been embezzled and stolen, in violation of Title 18, United States Code, Section 659. All defendants entered pleas of not guilty to the charges.

Motion to Suppress Physical Evidence

The defendants made a timely motion to suppress the physical evidence seized in the van. A hearing on the motion was held on June 5, 1975. Illinois State Trooper Paris testified that on November 17, 1974, at 1:30 A.M., the van occupied by the defendant was weaving back and forth on a two-lane highway. (M-4) Officer Paris and his partner, Officer Pabst, signaled the van to stop by

using a red light and a spotlight. The van immediately pulled over to the side of the road. (M-5)

The driver of the van, Frank Bertucci, got out of his vehicle and met the officers, who were approaching him from their car. When asked if he had been drinking, Bertucci said he was sleepy. Officer Paris did not detect the odor of alcohol or any other sign of intoxication. (M-6)

Officer Paris testified that Mr. Bertucci accompanied him and Officer Pabst to the front of the van. He then stepped in front of Officer Pabst and indicated he didn't want him looking into the van. A subsequent search of the front of the vehicle disclosed no alcohol or weapons. (M-7-8) At that time Officer Paris stated he had no reason to believe a crime had been committed. (M-8)

No traffic charges were filed against Mr. Bertucci and the police officers had no warrant to search the vehicle, but after searching the front of the vehicle, and finding nothing, they asked Mr. Bertucci to open the rear of the van, and he complied. (M-9) Officer Paris testified that Mr. Bertucci initially stated they were moving his aunt from Evansville to Chicago, but after the officers had seen the shipping labels and observed that the merchandise was new, he stated his aunt had bought it in Evansville. (M-10, 15) No boxes were opened at the scene of the stop, but in order to read the shipping invoice, it was necessary to take it out of a packet strapped to the boxes. (M-17)

The defendants were directed to drive to the Mount Carmel police station, but the officers claimed they were not under arrest at that time. (M-15) Upon arrival at the police station, Bertucci stated that his aunt had seen the advertisement in the newspaper in Chicago. His

father ran a liquidator store and they picked up the merchandise to sell in the store. (M-16)

Frank Bertucci testified he did not give his permission to Officer Paris or Officer Pabst to search his vehicle.

The trial court denied the motion to suppress.

The defendants were subsequently tried before the Honorable William G. Juergens, and a jury. Each was found guilty on both counts of the indictment, and their post-trial motions were denied. (Tr. 89) A pre-sentence investigation report was ordered, and the defendants' applications for probation were denied. (Tr. 92)

James Bertucci was sentenced to three years in the custody of the Attorney General of the United States on Count One of the indictment, and a probationary period of two years on Count Two, to begin at the expiration of the sentence imposed on Count One. Joseph Argento and Phillip Abbott were each sentenced to two years imprisonment on Count One, and two years probation on Count Two to begin at the expiration of the sentence imposed on Count One. (Tr. 101)

REASONS FOR GRANTING THE WRIT

Preliminary

This case is unique, perhaps even startling. As is definitively established by the dissenting opinion of Judge Luther Swygert, the Record establishes that the police in this case conducted an illegal search of defendants' motor vehicle on a public highway. The police then "directed" defendants to a police station where they were further searched without a warrant. (App. 10a-12a)

The majority attempt to excuse this conduct or these "acceptable limited intrusions" with:

1. A finding of "probable cause" for the searches on the highway and at the station (although there were no citations issued for traffic violations, there were no arrests, and no weapons were found after the van was stopped on the highway and after the defendants were directed to the police station).
2. The "plain view" doctrine (although the police officers admitted that the discovery of the subject cartons in the rear of the van gave them "no reason to believe an offense had been committed" (App. 11a)
3. A constructed theory of a "consent" to the search (although the trial court did not mention this theory and the police officers admitted there was an *initial* refusal to permit the search—App. 12a).

It is evident that the majority has placed its imprimatur upon the practice of these police officers to search a citizen's entire vehicle on the highway without a warrant on the mere happenstance that he was observed "weaving" over the center line, and then to arrest and make further search at a police station although no citation ever issues for a traffic, drinking, or any other violation. This search practice was described by one of the police officers as customary whenever a vehicle was stopped on the highway.

When the majority opinion is analyzed critically, it is seen that the opinion permits the government to "bootstrap" itself into such searches, and the later discovery of stolen merchandise will raise any thinly-disguised excuse to an "acceptable intrusion" into a person's Fourth and Fifth Amendment rights.

I.

The Trial Court Should Have Granted The Motion To Suppress For The Reasons That The Police Officers Had No Probable Cause To Stop And Search The Van Or To Subsequently Arrest The Defendant.

A. It was error for the trial court to deny the Motion to Suppress because the facts adduced at the hearing were sufficient to constitute probable cause to search the back of the van.

Searches conducted outside the judicial process, without prior judicial appro al, are *per se* unreasonable under the Fourth Amendment, and are subject to only a few specifically established and well defined exceptions. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 419 (1971). One such exception is defined by the case of *Carroll* v. *United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L. Ed. 543, which holds that a search warrant is unnecessary where there is probable cause to search an automobile stopped on a highway. In *Chambers* v. *Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970), the court stated the reasons for such an exception: "'[e]xigent circumstances' justify the warrantless search of an automobile stopped on a highway where there is probable cause because the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant is obtained." However, the burden is on those seeking the exemption from the general rule to show the need for it. *Coolidge, supra; United States* v. *Jeffers,* 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59; *Chimel* v. *California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

In this case the evidence adduced at the hearing on the Motion to Suppress shows the arresting officers were acting on mere suspicion rather than on probable cause when they reached the van in which the defendant was

riding. Mere suspicion or good faith on the part of the officers is not enough to render the search constitutionally permissible. *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). There was no reason to believe the occupants of the van were involved with any criminal activity, and the eventual discovery that the van contained stolen goods cannot be used to justify an illegal search.

The search can neither be justified under the "plain view" doctrine, nor by consent. In *Chambers, supra,* the court stated that the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. At the hearing on the Motion to Suppress, Officer Paris stated that he and Officer Pabst stopped the van solely because it was weaving over the center line of a two-lane highway, and they suspected the driver might be intoxicated. Mr. Bertucci, the driver of the van did not attempt to evade the police and immediately pulled over to the side of the road. Officer Paris then testified he detected neither the odor of alcohol nor any other symptom of intoxication with respect to Mr. Bertucci. He also testified that a search of the front of the van disclosed no evidence of alcoholic beverages or firearms.

At this point the officers had no reason to search any farther because the reason for stopping the van had proved groundless. In fact, no charges of intoxication or traffic charges of any kind were filed against Mr. Bertucci. Yet the police officers persisted in searching the back of the van despite Officer Paris' statement that he had no reasons for believing a crime had been committed at that time.

Officer Paris stated the boxes in the back of the van were in plain view and appeared to be new merchandise. This belief does not constitute probable cause because the boxes themselves are not contraband in the nature of weapons or illicit drugs. He had no reason to believe any crime had been committed; he had no description of a vehicle or of individuals who had been involved in a crime as was the case in *Chambers.* Consequently, as pointed out by Judge Swygert in the dissent, "though the cartons were in "plain view", they were neither instruments of crime nor, at the moment, evidence of a crime. (App. 10a).

Here, a case was developed against the defendants only after examining invoices which had to be taken out of the packets attached to the boxes, after opening the boxes at police headquarters, and after doing considerable investigatory work at the police station. The fact that the prosecution insists that the defendants were not arrested until he had been at the police station for a considerable period of time weighs heavily against the prosecution's case.

The facts in this case are almost identical to those of *Commonwealth* v. *Lewis,* 275 A.2d 51 (Pa. 1971). There a panel truck was stopped for operating a motor vehicle without lighted rear lights. The police officer observed four cartons and asked what they contained and how the defendants came into possession of them. One of the occupants of the van replied the cartons were found on the highway and contained old rags. The police officer also testified that the occupants gave conflicting stories concerning the cartons, but did not elaborate.

The officer entered the truck and looked into a partially-opened carton, and then took the defendants to police headquarters for investigation. A search without a war-

rant revealed the cartons contained a quantity of men's pants, and a subsequent investigation revealed they had been stolen.

The court found that there were insufficient facts to justify a finding of probable cause because the officer had no knowledge or information that a felon had been committed, and was not on the lookout for a truck involved in such a crime. Even after he made the on-the-spot arrest, he was merely suspicious that the cartons may have come into possession of the occupants of the van through unlawful means.

Even where the search of a moving vehicle is involved the officer must have independent probable cause to believe that a felony has been committed, and must have a basis for believing either that evidence of a crime is concealed in the vehicle or that there are weapons accessible to the occupants of the car. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed. 2d 538 (1967); *Brinegar* v. *United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L.Ed. 1879 (1949). While evidence required to establish probable cause need not amount to that required to convict, it must be much more than that which gives rise to a mere suspicion.

The attempt to manufacture a consent to the search is equally transparent. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that consent was, in fact, freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854. While voluntariness normally is a question of fact to be determined from all the circumstances, in this case the prosecution did not sustain its burden. Bertucci denied giving his consent and his statement is corroborated by Officer Paris' own statement of the facts. He testified that

at the initial stages of the investigation of the traffic infraction, Bertucci had stepped in front of Officer Pabst and indicated he did not want him to look into the van. It is unbelievable that Bertucci would invite the officers to search the entire van after he had been exonerated of any intoxication. As concluded by Judge Swygert, the evidence indicates "no evidence of a valid consent." (App. 11a)

Consequently, the events at the scene of the vehicle's stopping were sufficient to taint the seizure of the evidence, and these events alone were sufficient to grant the motion to suppress.

B. The troopers had no probable cause to arrest the defendants.

In "directing" the defendants to the Mount Carmel Police Station following the search of the rear of the van, Pabst and Paris had clearly placed them under arrest. Compare, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972). If any greater proof that they were under arrest is needed, it lies in the fact that they were immediately taken to the office of the Chief of Police and advised of their constitutional rights. The cartons and the invoice envelopes attached to them were opened, and the cartons inventoried. Bertucci then told Troopers Paris and Pabst that his aunt had seen an advertisement for the merchandise in a Chicago newspaper and that his father had purchased the goods. Bertucci told them that he had bought the cartons from one Eddie Andrews at 210 First Street, Evansville Indiana.

Utilizing this information, Pabst and Paris called the Evansville police, and were told that there was no record of such an address or individual. Utilizing the invoice removed from one of the cartons, Paris and Pabst called the hardware store in Beaver Dam, Kentucky to which

some of the merchandise was addressed, and were told that the merchandise had been ordered from Ohio several weeks before. This is a classic instance of police officers making an arrest without probable cause, on the mere suspicion that a crime had been committed. Once Pabst and Paris had searched the front of the van for weapons, and found none, and once they had inspected the rear of the van and found only cartons, they had by Paris' own admission no probable cause to believe that a crime had been committed, and therefore no ground upon which to restrain the freedom of Bertucci, Argento and Abbott.

In *Whitely* v. *Warden,* 401 U.S. 560, 566 (1971), the Supreme Court reaffirmed that it would not apply a less stringent standard for reviewing a police officer's assessment of probable cause for a warrantless arrest, than the Court would apply in reviewing a magistrate's assessment in issuing an arrest warrant. See also, *United States* v. *Straus,* 452 F.2d 375 (7th Cir. 1971).

Thus a warrantless arrest can be made only where the arresting officer has reasonable grounds to believe that the person to be arrested committed a crime, and mere suspicion, or a "hunch" of criminality, is inadequate to support an arrest. *United States* v. *Clay,* 495 F.2d 700 (7th Cir. 1974); *United States* v. *Guana-Sanchez,* 484 F.2d 590 (7th Cir. 1973), cert. dismissed as improvidently granted, 420 U.S. 513 (1975).

In *United States* v. *Guana-Sanchez, supra,* two police officers observed Sanchez in a station wagon parked in a vacant lot, with headlights and interior lights shining. When the officers approached the car, they observed Sanchez in the driver's seat reading an Illinois road map, and three other males in the car, one of whom was asleep. There were three shopping bags filled with "clothing or material" in the rear of the car.

At this point the officers began an inquiry which disclosed that Sanchez had a valid driver's license; that his passengers were probably Mexican; that the car was registered in the defendant's name, and that he was not wanted by the police. Sanchez and his passengers were then taken to a police station, where a Chicago immigration official spoke with the defendant's passengers, who admitted illegal entry into the United States. The defendant's arrest and prosecution for transporting illegal aliens followed.

In affirming the decision of the District Court to grant the defendant's motion to suppress as evidence the testimony of the defendant's passengers, the Court stated that while the police officers had acted on reasonable suspicion in approaching Sanchez and determining the validity of his driver's license and the ownership of the car, they thereafter had no grounds upon which to detain him, and no probable cause for his arrest.

So too here, assuming *arguendo* that Paris and Pabst had reasonable grounds for stopping the vehicle, and assuming further that they were justified in searching the van for alcohol and weapons out of fear for their own safety, and assuming even further that their inspection of the rear of the van was proper, at this point there was no reason to believe that a crime had been committed.

None of the occupants of the van had acted in a suspicious manner. The van stopped when signaled and a search for weapons or alcohol had turned up nothing. Bertucci did not exhibit any signs of intoxication, and explained that the van was weaving because he was tired. He displayed a valid Illinois driver's license, and a rental receipt for the van. His conduct, and that of the other occupants of the van, was entirely innocent. Trooper Paris himself admitted that at this point he had no

reason to believe that a crime had been committed. (MS 10) Yet the defendants were "directed" to the police station, advised of their constitutional rights, questioned, and the cartons were opened and inventoried. The search of the cartons and the questioning of Bertucci resulted in defendants being charged with possession of stolen merchandise.

The arrest of the defendants having been made without probable cause, the evidence gained thereafter was "fruit of the poisonous tree" and must be suppressed. *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963). Consequently the cartons, which were seized when the defendants were "directed" to the Mt. Carmel Police Station, and the statements of Bertucci at the police station, should have been suppressed at trial.

CONCLUSION

For the reasons given in this petition and those set out in the extended, persuasive dissent by Judge Luther Swygert, petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Attorneys for Defendant-Petitioner, Phillip F. Abbott

APPENDIX

Nos. 75-1795, 75-1796, 75-1797
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH J. BERTUCCI, a/k/a FRANK JAMES BERTUCCI, and JOSEPH A. ARGENTO, and PHILLIP F. ABBOTT,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois. No. CR 75-19-B
WILLIAM G. JUERGENS, *Judge.*

ARGUED JANUARY 21, 1976 — DECIDED APRIL 2, 1976

Before SWYGERT, *Circuit Judge,* BAUER, *Circuit Judge,* and HOFFMAN, *Senior District Judge.**

HOFFMAN, *Senior District Judge.* These appeals by the defendants Joseph J. Bertucci, a/k/a Frank James Bertucci, Joseph A. Argento and Phillip F. Abbott, from their convictions for possession of stolen goods in violation of 18 U.S.C. § 659 present the question of whether a warrantless search of a motor vehicle was reasonable under the Fourth Amendment. The district court denied the joint motion of the defendants to suppress evidence thus obtained and entered judgments of conviction upon jury verdicts of guilty. We affirm the judgments of the trial court.

At 1:30 a.m., on November 17. 1974, Illinois State Troopers Clyde Paris and Donald Pabst observed a north-

* The Honorable Julius J. Hoffman, Senior District Judge for the Northern District of Illinois, is sitting by designation.

bound Chevrolet van weaving back and forth across the center line of Illinois State Route #1, eight miles south of Mt. Carmel, Illinois. By means of a flashing red light, the officers directed defendant Bertucci, who was driving the van, to pull over into a gravel lot adjacent to the highway. Bertucci pulled over as directed and the officers parked behind the van. Bertucci then emerged from the van and met the officers between it and the patrol car. Upon request, Bertucci displayed a valid Illinois driver's license and when questioned about the weaving, replied that he was tired. Pabst and Paris detected no odor of alcohol.

The proceeded with Bertucci to the front of the van for the purpose of conducting a customary inspection for alcohol or weapons. At the open door on the driver's side, Bertucci stepped quickly in front of Pabst as if to restrain him from looking into the van. Proceeding to shine their flashlights through the front windows, the officers observed defendant Abbott in the passenger seat and also some shipping cartons in the rear of the van, with defendant Argento lying "spread eagle" over the tops of some of the cartons. Bertucci volunteered that the three men were moving his aunt from Evansville, Indiana, to Chicago, Illinois, and produced his copy of an agreement for the rental of the van. In their inspection, the officers discovered no alcohol or weapons.

Accompanied by all of the defendants, the officers moved to the rear exterior of the van. By flashlight through the window, they observed that the shipping cartons were sealed and that invoice envelopes were attached to them. Bertucci then stated that his aunt had bought the goods in Evansville and that he, Abbott and Argento were moving them to Chicago for her. The officers requested Bertucci's permission to examine the cartons more closely. In response, he opened the rear door of the van. The officers then removed an invoice bearing the address of a hardware store in Beaver Dam, Kentucky, from an envelope attached to one of the cartons. Bertucci said that

if permitted to make a phone call, he could verify his story of why the three men were transporting the cartons.

The officers then directed the defendants to the Mt. Carmel, Illinois, police station, where they were advised of their rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). At the station, the officers opened the shipping cartons and discovered the contents to be trousers and stereo components. By telephone conversation with the shopkeeper at the address in Beaver Dam, Kentucky, Pabst and Paris learned that goods ordered several weeks previously had not arrived. In a third version of why the defendants were in possession of the cartons, Bertucci stated that he had purchased them from an Eddie Andrews at 201 First Street in Evansville, Indiana. The Evansville police found no listing for Andrews or the address. While defendants were permitted an unlimited number of telephone calls from the police station, none produced information substantiating any of Bertucci's explanations.

The Fourth Amendment prohibits unreasonable searches and seizures. "Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967). The parties do not here question the reasonable police conduct of stopping a weaving van at 1:30 a.m., and inspecting the front thereof for intoxicants and weapons. *United States* v. *Hood*, 493 F. 2d 677, 680 (9th Cir. 1974), *cert. denied* 419 U.S. 852 (1974). What they vigorously dispute is the authority of the officers under the Fourth Amendment to inspect the rear portion of the van.

We conclude that the officers had probable cause to search the entire van for alcohol or weapons. Thus, any Fourth Amendment distinction between the front and rear portions is untenable. If the officers may lawfully search the front for alcohol or weapons, it would be unreasonable to expect them not to search the rear. Both

the front and rear are logical places for concealment of alcohol or weapons. In view of the weaving and the furtive attempt of Bertucci to restrain Pabst from looking into the van, the officers could justifiably expect to find alcohol or weapons, even though Bertucci had said that he was merely tired and the officers had detected no odor of alcohol. None of the defendants has suggested that a warrant is required to inspect the back seat of an automobile, which has been stopped for weaving, for weapons or alcohol. Open to view by flashlight from three windows, the rear portion of the van is like the back seat of an automobile. It is unlike the trunk, which because of its complete enclosure, might generate a greater expectation of privacy than the back seat, and even a trunk is accessible to warrantless search under appropriate circumstances. *Cady* v. *Dombrowski*, 413 U.S. 33 (1973). Furthermore, the fact of nightfall makes no difference in the case before us. Darkness does not usher in a set of Fourth Amendment rules different from those applicable in daylight.

The limited intrusions of Pabst and Paris are acceptable for other reasons. It is familiar doctrine that objects in plain view of officers rightfully in position to have that view are subject to seizure without warrant. *Harris* v. *United States*, 390 U.S. 236 (1967). The stop by the officers of the weaving van rightfully brought them into position to observe the cartons by flashlight through the front or rear windows. The shipping cartons plainly visible in the rear might have contained either weapons or intoxicants. It is no answer that they contained evidence of a crime instead, for the Supreme Court has recognized that ". . . often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits or instrumentalities of a crime, or contraband." *Cady* v. *Dombrowski, supra*, 413 U.S. at 442.

When at the rear of the van, Bertucci modified his original explanation of the presence of the cartons, it would have been reasonable for the officers to conduct a more extensive search than the inspection actually undertaken. Bertucci realized that the sealed shipping cartons with invoice envelopes attached appeared new to the officers, and hence he explained that his aunt had bought the goods in Evansville. The evasiveness of a defendant was among the factors establishing reasonable grounds for an automobile search in *United States* v. *White*, 488 F. 2d 563 (6th Cir. 1973), and courts have long recognized the utility of a motor vehicle for transporting evidence beyond official grasp, adjusting standards for warrantless automobile searches accordingly. *Carroll* v. *United States*, 267 U.S. 132 (1924); *Chambers of Maroney*, 399 U.S. 42 (1970); *United States* v. *Zemke*, 457 F. 2d 110 (7th Cir. 1972).

Even if we assume that the modified story and the mobility of the van do not together establish the reasonableness of the limited intrusions that occurred, the trial court might properly have found that Bertucci consented to the inspection of the cartons in the rear. Whether consent to a search is voluntary is to be determined from the totality of the circumstances. *Schneckloth* v. *Bustamonte*, 912 U.S. 218 (1973); *Watson* v. *United States*, ... U.S. ....., 44 LW 4113 (1976). Although Bertucci testified that he never gave permission to search the van, he nevertheless opened the rear door in response to the officer's request to examine the cartons more closely. The record discloses no overt act, threat of force, promise or other form of coercion suggesting that the opening of the door on a public highway prior to any arrest was other than voluntary. *Watson* v. *United States*, 44 LW at 4116. Justifiably, the officers inspected the cartons and removed an invoice from an envelope attached to one of the cartons.

We recently said that "the ultimate test of the legality of the search and seizure is the reasonableness of the police officer's conduct." *United States* v. *Balanow*, 75-1479 (7th Cir. 1976) (Slip Op. at 3). The record before us discloses limited intrusions acceptable on grounds of inspection for weapons and intoxicants as well under the "plain view," "consent," and "automobile" exceptions to

the warrant rule. These limited intrusions in turn produced sufficient information to establish reasonable grounds for a full search of the shipping cartons in the rear of the van. We cannot conclude that this police conduct is unreasonable under the Fourth Amendment.

Defendants Argento and Abbott also contend that there is insufficient evidence to establish their guilt beyond a reasonable doubt. If there is substantial evidence, taking the view most favorable to the Government, to support the verdict of the jury, the verdict must stand. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Keefer*, 464 F. 2d 1385, 1388 (7th Cir. 1972).

All of the defendants occupied a van ultimately found to contain stolen goods. The officers initially observed Argento lying on top of the cartons that contained these goods. Mud and cockleburrs were visible at the time of arrest on the clothing of the defendants and muddy clothing lay in the rear of the van. There was testimony that the cartons of trousers had been removed on the day of the arrest from a trailer standing on a lot in Evansville, Indiana, that was wet, muddy, and overgrown with weeds bearing burrs. There was evidence that the stereo equipment had been removed from a shipping dock in Evansville within a period of two days prior to the arrest. Argento and Abbott nodded their assent to Bertucci's explanations for the presence of the cartons in the van. Because we therefore conclude that substantial evidence supports the verdicts of the jury and that, for the reasons set forth, the motion to suppress was properly denied, the judgments of conviction will be, and are *affirmed*.

AFFIRMED.

SWYGERT, *Circuit Judge*, dissenting.

A few additional details are needed to round out the factual situation as presented by Judge Hoffman. The road on which the van was traveling was a two-lane highway and the traffic was light. After the vehicle had been stopped and the initial conversation had occurred between Bertucci and trooper Pabst, officer Paris testified that, "We started to the front of the van and Mr. Bertucci stepped in front of Pabst and indicated he didn't want him to look in the van for some reason or another." The testimony continued:

"Q. There was no other conversation from Mr. Bertucci with either of you officers up to this point, is that correct?
A. Well, about that point he started telling why he was down here in a van. Other than that, none.
Q. Was that in response to any question of yours to him?
A. Well, we automatically looked in the car for booze, weapons, other people in the car and we seen the new boxes or what appeared to be factory-crated boxes.

• • • •

Q. You found nothing?
A. Neither beer nor weapons.
Q. Did you search the glove compartment at this time?
A. No, we did not.
Q. Was there any reason for you to believe at that point that a crime had been committed?
A. No, there wasn't. • • •
Q. Were any traffic charges placed against Mr. Bertucci or the other individuals in his van?
A. No, there was not.
Q. Did you have a warrant to search the vehicle?
A. No, sir.

• • • •

Q. After searching the front of the vehicle, what did you do then?

A. We asked Mr. Bertucci if he would open the rear of the van, that we would like to look in there which he did.
Q. What did you then do?
A. We looked a little closer at the boxes, at the invoices.
Q. Did you actually get into the van itself?
A. I don't know, sir. We didn't crawl in. We just looked at the back boxes and at this time Mr. Bertucci changed his story from moving the van to Chicago to picking up some articles which —
Q. At that time you had no reason to believe that any offense had been committed, had you?
A. No, sir.
Q. Was there anything unusual about these boxes in the back of the van?
A. Just his story was the only thing."

Admittedly, under certain circumstances police officers may conduct a warrantless search of a vehicle which has been moving on a highway. In *Carroll* v. *United States*, 267 U.S. 132 (1925), the Supreme Court recognized such a search is constitutionally valid if probable cause exists. The difficult question then is: was there probable cause for a search without a warrant? In *Brinegar* v. *United States*, 338 U.S. 160 (1948), Mr. Justice Rutledge writing for the Court defined the phrase in general terms: "In dealing with probable cause, however, as the very name implies, we deal with probabilities . . . 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' Since Marshall's time at any rate, it has come to mean more than bare suspicion." 267 U.S. at 175. Mr. Justice Rutledge continued: "The troublesome line . . . is one between mere suspicion and probable cause. . . . [A] citizen who has given no good cause for believing he is engaged in . . . [criminal activity] is entitled to proceed on his way without interference." The decision emphasized that travelers on public highways may not be stopped and searched at the "officers' whim, caprice or mere suspicion." 267 U.S. at 177.

Here the question is whether the state troopers had probable cause to make the initial search of the van on the highway which resulted in a full search of the cartons at the police station or did they act on mere suspicion. The officers issued no citations for traffic violations, there were no arrests, and no weapons were found after the van was stopped on the highway. Consequently there was no reason for the state police to detain Bertucci and his passengers. It is apparent from the evidence that the police officers' observation of the cartons in the rear of the van and Bertucci's explanation for their being in the van aroused the suspicion of the police. But it was *only* suspicion. Under no circumstances could these observations represent sufficient probable cause for a warrantless search.

The majority attempts to invoke the plain view doctrine to justify the search. In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), the Supreme Court dealt extensively with the doctrine. There, the Court assumed that the police had probable cause to seize the automobile in question, but held that the plain view exception to the warrant requirement was inapplicable. Mr. Justice Stewart wrote: "Where the initial intrusion that brings the police within plain view of such an [article of incriminating character] is supported, not by warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. . . . And an object which comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. . . . Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." 403 U.S. at 465-66. The doctrine, however, has severe limitations. Mr. Justice Stewart explained:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence in-

criminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. *Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.* 403 U.S. at 466. (emphasis added.)

In the case before us, it could hardly have been "immediately apparent" to the police that the cartons they saw in the rear of the van were "evidence." In fact, the testimony of officer Paris quite clearly indicates the officers had no reason to believe an offense had been committed, thus no reason to believe an event had occurred for which evidence might be seized. The fact that subsequent investigation showed the cartons contained stolen goods is irrelevant. "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. . . . A search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars* v. *United States*, 273 U.S. 28, 29 (1927).

Coolidge also emphasized the need for prior justification for the initial intrusion which led to the seizure of an object in plain view. Here, there was no search incident to an arrest or any other recognized exception to the warrant requirement. What the police saw when they directed their flashlights toward the back of the van were some cartons. After the rear door of the van was opened they conducted a closer inspection and found that the cartons were labeled with shipping invoices.

Thus, though the cartons were in "plain view," they were neither instruments of crime nor, at the moment, evidence of a crime. The Supreme Court stressed in *Coolidge* that the plain view doctrine "*alone* is never enough

to justify the warrantless seizure of evidence," the discovery "must be inadvertent," and occur after an "initially valid (and therefore limited) search." The police may not justify a planned warrantless seizure by maneuvering themselves within the plain view of the object they want. 403 U.S. at 468-70. The circumstances in this case cannot render the "plain view" doctrine applicable.

The majority also constructs a theory based on "consent" to justify the search. (The district judge did not base his denial of the motion to suppress on any such theory.) But this, upon analysis, also fails.

A search conducted pursuant to a valid consent is constitutionally permissible; however, the consent must be freely and voluntarily given. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). In this case there is no evidence of a valid consent. If anything, the evidence indicates an initial refusal by Bertucci to permit a search of the van. The troopers, however, proceeded to search the front of the van. When asked what they did next, officer Paris testified: "We asked Mr. Bertucci if he would open the rear of the van, that we would like to look in there which he did." The consent theory hangs on this thin isolated statement. Given the circumstances preceding the request and the situation in general, this is too weak to support it. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968).

Officer Paris testified at the hearing on the motion to suppress that Bertucci said that if defendants could get to a telephone they could satisfy the officer that the cartons "were being picked up for an aunt." The officer further testified that he and officer Pabst followed the defendants to the Mount Carmel police station. At the trial, officer Paris testified: "We directed them to drive

to the Mount Carmel Police Department where calls could be made and confirm that this stuff did not belong to their aunt." At the police station the defendants were advised of their *Miranda* rights. The officers apparently then opened the cartons and found that some of them contained blue jeans and others contained stereo equipment. Upon telephonic investigation it was ascertained that all the items were stolen. The majority opinion states:

> The record before us discloses limited intrusions acceptable on grounds of inspection for weapons and intoxicants as well under the "plain view," consent," and "automobile," exceptions to the warrant rule. These limited intrusions in turn produced sufficient information to establish reasonable grounds for a full search of the shipping cartons in the rear of the van.

Since none of these exceptions to the warrant rule were applicable, in my view the police were not authorized to "direct" the defendants to the police station, to question them, or to open the cartons without a search warrant. The "fruits" of this illegal detention, questioning, and search were tainted by the illegal actions of the police at the highway scene and therefore should have been suppressed.

In sum, I think we must keep in mind what Mr. Justice Jackson wrote in his dissent in *Brinegar*:

> [T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.
>
> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of

> the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.
>
> • • •
>
> We must therefore look upon the exclusion of evidence in federal prosecutions, if obtained in violation of the Amendment, as a means of extending protection against the central government's agencies. So a search against [the defendants'] car must be regarded as a search of the car of Everyman.

I would reverse.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
June 4, 1976

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Nos. 75-1795, 75-1796, 75-1797

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES J. BERTUCCI, a/k/a FRANK JAMES BERTUCCI, PHILLIP F. ABBOTT and JOSEPH A. ARGENTO,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Illinois, Benton Division.
No. 75-Cr-19-B

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause, a vote having been requested on the suggestion for rehearing in banc, and a majority of the active members of the court having voted to deny rehearing in banc,

It Is Ordered that the suggestion for rehearing in banc be, and the same is hereby, DENIED.

Judge Swygert voted to grant rehearing in banc.